No. 16255

United States
COURT OF APPEALS
for the Ninth Circuit

CARL E. THORSON,

Appellant,

vs.

INLAND NAVIGATION COMPANY,
a Corporation,

Appellee,

vs.

ARCHER-DANIELS-MIDLAND CO.,

Third Party Appellee.

IN ADMIRALTY

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-59

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STATEMENT OF THE CASE

The appellant, Carl E. Thorson, was an employee of Archer-Daniels-Midland Co., the third party appellee (Pretrial Order p. 2). Thorson chose to elect not to accept compensation from his employer, Archer-Daniels-Midland Co., but rather filed his election to sue and pursue his remedy against a third party, the appellee, Inland Navigation Company.

The appellee towed its barge containing wheat to a dock in Vancouver, Washington, on the Columbia River. Pursuant to its tariff, the appellee moored the barge and then left with its tug and was to return and pick up the barge when it was notified by Archer-Daniels (Tr. 61-62). The unloading was to be done by Archer-Daniels and no employees of the appellee were present at the time of the unloading or at the time of the accident (Tr. 63).

The baker flag not only acted as a warning that inflammables or explosives were carried, but also acted as a wind indicator. The flag was loose in its holder so that the wind could turn the flag one way or the other (Tr. 64). A cloth or similar type wind indicator would not have lasted in the Columbia gorge for even one trip (Tr. 68). It was also necessary to have an indicator or baker flag that could be easily removed as the barge went under obstacles, such as bridges, which barely cleared the deck of the barge (Tr. 66). The flag, weighing about 25 pounds, was held in its vertical holder by the force of gravity and it could not fall out. The only way it could come out was by being manually lifted out of its holder.

SUMMARY OF ARGUMENT

The barge, and particularly the baker flag and its holder, was seaworthy.

ARGUMENT

The only charge of unseaworthiness is that "the signal flag was not properly secured to the vessel but was loose in its socket and position (ed) where it was wont to fall into the hold of said vessel" (Pretrial Order p. 2).

The trial court found and concluded:

"1. The baker flag, as installed on the barge involved, was recognized gear and equipment on barges plying the same trade in the Columbia and Willamette Rivers.

"2. It was physically impossible for the baker flag to become disengaged from its standard socket through its own action and, in order to be removed and caused to be flung as it was and strike the libelant, it would have to have been manually withdrawn or cast by a person or some line would have to have become fouled with the flag which caused it to be yanked from its socket.

"(1) The fact that the baker flag moved freely within its socket did not render the barge unseaworthy.

"(2) The barge was not unseaworthy in any respect."

In accordance with *McAllister vs. U.S.*, 348 US 19, 75 S. Ct. 6, the judgment of the trial court will not be set aside unless it is "clearly erroneous." A cursory survey of the record clearly shows that the above findings are supported by the evidence.

The standard determining seaworthiness is "that equipment be reasonably fit for the use for which it was intended * * * (seaworthiness) has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard * * * ." *Manhat v. U.S.,* 220 F.2d 143, 148 (9th CA, 1955).

As is apparent from the trial court's findings, the trial court did not determine what force pulled the flag out of its socket. It did find that it definitely could not come out unless it was pulled out intentionally or unintentionally. There are very few pieces of equipment or gear around a vessel which cannot be pulled loose from their position where they are held by gravity or by some fastening, if force is applied. Hatch covers, such as on this barge, deck cargo on river vessels, certain kinds of stanchions; all can easily be lifted up and are fitted or stowed with this intention. This Court recently in *Freitas vs. Pacific-Atlantic SS Co.,* 218 F.2d 562 (CA 9th, 1955), had occasion to consider a set of facts very similar to those involved here. In that case the ship was being unloaded by an independent stevedoring firm by whom the plaintiff was employed. The hatch was partially uncovered by the stevedores, but three of the stock backs and the hatch boards covering them were left in place. The stevedore was engaged in lifting a scow flat, which it had placed in the hold, from the hold onto the main deck. This was done by attaching four cables to the scow and lifting it through the partially uncovered hatch to the main deck. As it was pulled up, the scow caught against the middle

strong back which had been left in place and pulled it from its supporting slots and the hatch boards which it had been supporting fell and one of them struck the plaintiff. The complaint charged unseaworthiness in that the locking mechanism of the strong back was defective, that the strong back was not properly locked at the time of the accident, that the strong back itself was faulty and defective and did not fit into the slot. No evidence in support of any of these claims was produced. In the *Freitas* case the strong back was lifted out of its slot by the action of the raising of the scow flat; in this case the flag was lifted out of its socket by some force, exactly what is unknown. This court in the *Freitas* case said:

> "There was no showing that if a locked strong back is in a seaworthy condition it cannot be dislodged by the force improperly and unnecessarily applied to it here * * * the law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship."

In *Manhat vs. U.S., supra,* the court also had the same general subject matter, i.e., a device which could be pulled up and dislodged by a person. In that case workmen in a lifeboat were injured when the lifeboat fell. The evidence was that someone had pulled the releasing lever, allowing the lifeboat to fall. The libelant in that case relied upon the fact that a workman could pull the releasing lever up, thus releasing the boat, and there were no additional safety measures either to prevent the workmen from pulling up the releasing lever or to stop the lifeboat from falling if the releasing

lever was pulled up. Justice Medina, speaking for the court, said:

> "Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle (of the releasing lever) would be moved by one of these men."

The present facts also might be considered similar to the general facts in *Benton vs. United Towing Co.*, 120 Fed. Supp. 638 (N.D. Cal., 1954). In that case the plaintiff seaman worked on an oil barge and he discharged the oil in the barge to certain steamships by means of a large hose which was held up by lines from a boom (not dissimilar to the spout in the present case). The lines raising and lowering and moving the boom were operated by a winch which the plaintiff operated. While the plaintiff was lowering the hose, the handle of the winch must have gotten away from him and rapidly revolved, hitting him in the face. He charge unseaworthiness because the dog which acted as the brake on the winch should have been on a spring so it would release automatically when the pressure was taken off it by turning the handle. He made other charges of unseaworthiness. Judge Hamlin stated:

> "The court is unable to find any negligence on the part of the respondent, nor is the court able to find that the vessel and its gear or appliances were unseaworthy."

The court further said:

> "Properly operated, the winch was safe and a reasonable device for the operation it was called upon to do. This is demonstrated by the fact that

> Benton had safely performed the operation many times a day all during the time he worked on this barge, and that others working on the barge had similarly performed this operation many times without accident. (This is generally like the testimony in the present case.) The winch may not have been the latest and very safest device available for this type of work. However, that is not the test."

Appellant cites *Wiel and Amundsen, A/S, as Claimants of the SS ROMULUS, Appellant vs. Roy E. Potter, Appellee,* 228 F.2d 341 (9th CA). In that case this court affirmed a decree made by reason of the fact that a rod, part of the railing, was loose and gave way when it was grasped. From the facts as stated by the court, it appears that this rod was a part of the railing and purpose of the railing was to offer support to people walking on the deck. The railing was loose and couldn't be fastened because the hole through which the cotter pin should go was painted over. The trial court found the vessel was unseaworthy in this respect and certainly there was ample evidence to support it. The railing was for protection and certainly wasn't reasonably suitable for this as part of the railing was loose and could afford no protection. No connection between that case and the case here on appeal can be seen.

Likewise, *Yarbrough vs. American Mail Line,* 119 Fed. Supp. 776 (S.D. Cal) is of no assistance. The trial court stated:

> "The heel block on the No. 1 port boom was frozen in an improper position because of rust and corrosion."

Certainly that would be evidence of unseaworthiness, but that is not the situation here.

Next, appellant relies on *Williams vs. Lykes Bros. SS Co., Inc.,* 132 Fed. Supp. 732 (E.D. La.). According to the trial court the fact was:

> "Where, as here, without apparent cause, a supporting member of the deck of a vessal falls over and injures a longshoreman working in the hold of the vessel, the vessel is unseaworthy * * * ."

That was not the situation here. The flag had to be pulled out of its holder.

It is not clear to the appellee from appellant's brief whether or not the appellant is relying upon *res ipsa loquitur* or some other similar rule that the happening of an accident is sufficient proof of unseaworthiness as a matter of law. Appellant has cited *Johnson vs. United States,* 333 US 46, 68 S. Ct. 391, which was a case involving negligence and in which the court invoked *res ipsa.* Even if that case were otherwise fully applicable, it would not support a reversal in this case. As the majority stated:

> "The rule of res ipsa loquitur applied in *Jesionowski vs. Boston & Maine R. Co., supra,* means that 'the facts of the occurrence warrant the inference of negligence, *not that they compel such an inference.*'" (Emphasis supplied.)

The doctrine can be used to affirm a trial court's finding of negligence, but it cannot be used to reverse a trial court's finding of no negligence. The facts in the *Johnson* case, too, are very dissimilar from those here and the trial court found that the inference was that the accident was caused by the negligence of a fellow employee.

Lastly, the libelant relies upon the decision of this court in *Petterson vs. Alaska SS Co., Inc.,* 205 F.2d 478, Aff'd 347 US 396, 98 L. Ed. 798. Superfiicially, this case might appear contrary to the proposition that to apply *res ipsa,* exclusive control of the instrumentality is a necessary part of the proof. Such is definitely not the case. Chief Judge Denman stated the problem:

> "The question presented is whether a vessel's owner is liable for injuries received by an employee of a stevedoring company (an independent contractor) on board ship while engaged in the loading of the ship where the injuries are caused by a breaking block brought on board by the stevedoring company."

Then the court went on to say:

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> "In making this inference, we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a species of strict liability regardless of fault (citation). It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, (citation) (it is this language which may be particularly deceiving); or that the result would not have occurred unless someone were negligent, (citation). It is only necessary to show that the condition upon which the absolute liability is determined, unseaworthiness—exists."

This court, in the *Petterson case,* was concerned with the *responsibility* for injury, not the *causation*

of injury. This court held, even though the shipowner did not have exclusive control over the block, in fact had no control as it was brought aboard and operated by the stevedore, that the shipowner was still responsible as a shipowner has a non-delegable duty to provide a seaworthy ship for longshoremen. In the *Petterson* case, causation was relatively simple; the block would not normally break unless it was unseaworthy. The cause being found to be the defective block, this court held that the ship was responsible because the block was used for loading the ship, regardless of who furnished it or who was using it at the time of the accident.

No inference of unseaworthiness is raised here simply because the accident happened (as pointed out before, even if such an inference were raised, it would not compel a reversal of the trial court). No inference is possible because the appellee was not in exclusive control of the barge or of the baker flag and, secondly, the injury was not caused by reason of an occurrence which would not have ordinarily taken place except for a defective device. As Chief Judge Denman said, res ipsa is a means of determining causation. If applicable, it raises an inference that the damage was cause by the negligence of the appellee. If the appellee was not in exclusive control of the instrument causing the damage, then there would be no inference that the device was defective as it would be equally permissible to infer that the accident was caused by a defective use of the device by someone for whose actions the appellee is not responsible. How, by any logic, could an inference be made that appellee pulled the flag out when the appellee

had no employees present and the only people on the barge were longshoremen employed by Archer-Daniels-Midland. The other reason that the inference cannot arise is because this is not the type of accident that normally would not occur unless the device was defective. The inference most readily coming to mind in this set of facts is that the injury was caused by the intentional or negligent acts of Archer-Daniels-Midland longshoremen. Somebody had to pull that flag out and the only people there were longshoremen of Archer-Daniels. The trial court did not find the specific force which pulled out the flag (Finding of Fact No. 2), but it is submitted that the most likely cause, as drawn from the record, is that some longshoreman tied a line from the boom around the flag and when the boom was raised it pulled the flag out of its socket (Tr. 31, 77, 88-89, 112).

In summary, it is submitted that the most likely conclusion to be drawn from the record is that the baker flag was pulled from its socket because a longshoreman wrapped a line from the boom around the flag and when the boom was raised it pulled the flag out. The findings of the trial court, rather than being clearly erroneous, are obviously in complete accord with the great weight of the evidence. There is no evidence to base any finding that the baker flag was unseaworthy. There can be no inference from the accident that the accident was caused by a defective device.

Respectfully submitted,

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